APR 16 1985

No. 84-1471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BEECH AIRCRAFT CORPORATION,
Petitioner,

vs.

DORIS ELSWORTH, MILDRED BEST, SANDRA DUNAWAY, and JO ANN MIRO,
Respondents.

BRIEF OF THE BOEING COMPANY, CESSNA AIRCRAFT COMPANY, GULFSTREAM AEROSPACE CORPORATION, LOCKHEED CORPORATION, McDONNELL DOUGLAS CORPORATION AND PIPER AIRCRAFT CORPORATION AS AMICI CURIAE IN SUPPORT OF THE PETITION OF BEECH AIRCRAFT CORPORATION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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April 15, 1985

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

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MOTION OF AMICI CURIAE FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Boeing Company, Cessna Aircraft Company, Gulfstream Aerospace Corporation, Lockheed Corporation, McDonnell Douglas Corporation and Piper Aircraft Corporation hereby respectfully move for leave to file the attached brief as amici curiae in support of the petition of Beech Aircraft Corporation for writ of certiorari to the Supreme Court of California in this case. The interest of amici curiae in this case arises from their business as manufacturers of commercial and private aircraft and related equipment. Amici curiae have requested consent to the filing of this brief from the parties to this action. Petitioner has given its consent, but respondents have refused consent.

In the Federal Aviation Act of 1958, 49 U.S.C. § 1421(a)(1), Congress directed the Secretary of Transportation to establish uniform, minimum standards for aircraft design, materials, workmanship, construction, and performance. Congress also established an agency certification process to permit the FAA to verify compliance with these standards prior to the manufacture and operation of aircraft. In the instant case, however, the California Supreme Court concluded that a trial court may make its own independent determination as to whether a par-

ticular aircraft complies with these standards and may predicate a finding of negligence *per se* on a judge's or jury's own interpretation and application of these standards. If this decision is permitted to stand, it will emasculate the uniform federal standards set by Congress and the Federal Aviation Administration concerning the certification of aircraft and will subject the petitioner and amici curiae to widely varying and conflicting standards governing the certification of aircraft. The decision also violates Congress' intent to vest primary jurisdiction over the interpretation and application of uniform federal standards for the certification of aircraft in the Federal Aviation Administration. Finally, the decision will result in the review of federal administrative decisions and regulations by state and federal courts in future aviation accident cases, in violation of § 1486 of the Federal Aviation Act.

The brief which amici curiae request permission to file addresses important issues raised by the Court's decisions in *Silkwood v. Kerr-McGee Corp.*, ____ U.S. ____, 104 S.Ct. 615 (1984) and *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, ____ U.S. ____, 104 S.Ct. 2755 (1984) but never previously decided by the Court. For the reasons stated above, the views of amici curiae expressed in the attached brief are worthy of the Court's consideration in deciding whether to grant the petition of Beech Aircraft Corporation for writ of certiorari.

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PRELIMINARY STATEMENT

This matter presents important issues not previously addressed by this Court concerning the relationship between the principles set forth in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, ____ U.S. ____, 104 S. Ct. 2755 (1984) and *Silkwood v. Kerr McGee Corp.*, ____ U.S. ____, 104 S. Ct. 615 (1984). Respondents are the heirs of the pilot and three passengers who died in the 1974 crash of a Travel Air twin engine airplane manufactured by petitioner Beech Aircraft Corporation. The principal issue presented is the following:

May the states and the federal trial courts sitting in diversity cases conduct their own independent review of discretionary air-

worthiness standards published by the Federal Aviation Administration ("FAA") and hold the manufacturer of an aircraft liable for a violation thereof, even though the FAA has determined that the aircraft meets all FAA certification requirements and has issued a certificate to that effect?

INTEREST OF THE AMICI CURIAE

The amici curiae submitting this brief are manufacturers of commercial and private aircraft and related equipment. The Supreme Court of the State of California in this case held that the doctrine of negligence *per se* may be applied to hold such manufacturers liable for a violation of the FAA's discretionary airworthiness standards, even though the FAA has certified the aircraft in question as meeting federal safety requirements. The effect of this decision is to permit state and federal trial courts to review the decision of the FAA to certify aircraft and decide for the FAA how its airworthiness standards must be interpreted and applied in connection with the certification of aircraft.

The decision of the California Supreme Court is of major consequence to the aerospace industry. Under the Federal Aviation Act of 1958, 49 U.S.C. §1301 *et seq.*, an elaborate system of uniform, federal regulation has been established to regulate the design and manufacture of civilian aircraft. Extremely technical and complex judgments concerning these design and manufacturing processes have been entrusted by Congress to the Federal Aviation Administration. Exhaustive design reviews, inspections and testing are conducted by the FAA and its designated representatives prior to the manufacture of any new aircraft. The FAA has published a number of guidelines, referred to as airworthiness standards, which it considers in the process of certifying a new aircraft design. Many of these standards are highly technical. (Typical examples are the standards pertaining to transport aircraft structures, 14 C.F.R. §§ 25.301-25.581, which have been lodged with the Court.)

However, these airworthiness standards are not intended to serve as the definitive criteria for aircraft design and are subject to the expert interpretation of the FAA. To preserve flexibility, the FAA retains discretion to depart from these standards or to supplement them with additional requirements.

When the FAA has been satisfied that an aircraft meets an appropriate level of safety, whether or not in strict compliance with the airworthiness standards, the FAA issues a type certificate approving the aircraft design. A production certificate may subsequently be issued for the manufacture of duplicate aircraft. Finally, at the conclusion of the development process, an airworthiness certificate is issued if the FAA finds that the particular aircraft in question conforms to the type certificate and is in a condition for safe operation.

Respondents in the case at bar argued that the aircraft in question was unlawfully certified by the FAA, because it allegedly failed to meet five airworthiness standards read to the jury at the close of the trial. Permitting this type of *ad hoc*, piecemeal, independent and *de novo* review by courts and juries when the FAA has already certified the aircraft in question will introduce conflicts and uncertainty as to the governing standards for aircraft certification and inevitably undermine the integrity of the process.

The result will be a court-by-court review of FAA certification policy, resulting in considerable confusion in an area in which Congress intended to maintain a uniform, federal standard. It has the potential to impair rather than advance aircraft safety, because it will undermine uniformity in design standards and will produce a more complicated, less efficient and more expensive process of aircraft certification.

The decision below is in conflict with this Court's recent decision in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, ____ U.S. ____, 104 S. Ct. 2755 (1984), and represents a wholesale shifting to the manufacturer

of the federal liability for certification decisions that was held barred in that case. The decision also misconstrues the Court's recent decision in *Silkwood v. Kerr McGee Corp.*, ____ U.S. ____, 104 S. Ct. 615 (1984), and conflicts with recent decisions of the United States Court of Appeals for the Sixth Circuit and the United States District Court for the District of Columbia on the use of Federal Aviation Regulations to support a theory of negligence *per se*.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The Determination By The FAA That The Aircraft Complied With Applicable FAA Regulations Preempts Adjudication Of The Identical Issue In Personal Injury And Wrongful Death Litigation

This Court has recognized four grounds for finding that federal law preempts state law in the same field:

> [1] The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.... Or [2] the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.... Likewise, [3] the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.... Or [4] the state policy may produce a result inconsistent with the objective of the federal statute.

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). *Accord, Pacific Gas & Electric v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 203-05 (1983); *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 158 (1982); *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633 (1973). There can be little doubt that

federal regulation of aircraft certification meets all of the foregoing criteria and thereby preempts state activity in this field.[1]

A. The Scheme of Federal Regulation is so Pervasive as to Preclude State Action

The Federal Aviation Act of 1958 (the "Act"), 49 U.S.C. §1301 *et seq.*, vested plenary authority to regulate the design and manufacture of commercial and private aircraft in the Federal Aviation Administration (the "FAA"). Section 601 of the Act, codified at 49 U.S.C. § 1421, empowers the Administrator "to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time ... [s]uch minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety ..."

The House Report on the Act clearly expresses this congressional intent:

> The new Federal Aviation Agency would be headed by a civilian Administrator with plenary authority to ... (d) [m]ake and enforce safety regulations governing the design and operation of civil aircraft.

H.R. Rep. No. 2360, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Ad. News 3741, 3741-42 (hereinafter "House Report"). The legislative history emphasizes the importance of a uniform, well planned, federal system of safety regulations:

> The most carefully thought out and designed equipments alone cannot make for safety in air traffic operations. Something more than communications and intricate

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[1] In *Silkwood*, the Court indicated that the traditional preemption tests could be grouped into two basic categories, but at the same time the Court reaffirmed its earlier holdings, including *Pacific Gas*, which analyze preemption questions under the four traditional tests.

> guidance devices must be provided. There must be a well planned system, operated by qualified technicians working within the framework of rules devised to provide safety features necessary for modern-day air operations.
>
> The most careful consideration must be given in the drafting of these regulations. An understanding of the system sought to be achieved and a knowledge of the problems faced at the operations level are necessary if the regulations are to accomplish their purpose.

House Report at 3746-47.

This Court has long recognized the pervasive nature of federal regulation in the field of aviation:

> Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.

City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 633-34 (1973), quoting *Northwest Airlines v. Minnesota,* 322 U.S. 292, 303 (1944) (Jackson, J., concurring). "As originally enacted, the...Act vested...all regulatory authority over aviation safety" in the FAA. *Varig,* 104 S.Ct. at 2760 n.5.

Although the Federal Aviation Act preserves existing state remedies, 49 U.S.C. § 1506,[2] the Court has held that language

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[2] The California Supreme Court relied on 49 U.S.C. §1506 for its holding that Congress had not occupied the field of aircraft regulation. At the same time, however, the court conceded that federal law "may have completely occupied the field of regulation of aircraft safety and certification." 37 Cal. 3d at 549. Indeed it has. Moreover, it is important to note that consistent with the dictates of § 1506, respondents' state law remedies will in no way be cut off by reversal of the decision below. Plaintiffs would still be able to recover compensatory damages for negligence or product defects.

like that in §1506 cannot be permitted to undermine the uniformity that Congress intends to achieve with federal regulation. *Texas & Pacific Railway v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907).

This Court has indicated that state action motivated by safety concerns is preempted when the federal government has occupied the field of safety regulation in a particular industry. *Pacific Gas & Electric v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 212-13 (1983)(upholding regulation motivated by economic concerns). In this case, the California Supreme Court conceded in its opinion that it was acting out of a concern for safety.[3] Such state action unquestionably has been preempted under the reasoning of *Pacific Gas.*[4]

B. The Federal Interest in Aircraft Certification is so Dominant as to Preclude State Action

The California Supreme Court's decision in this case totally ignores that a "dominant federal interest" may serve as a basis for preemption, *see* 37 Cal. 3d at 548, even though this test has been firmly established by the Court. Even a brief examination of the relevant interests reveals that the design, manufacture, testing and certification of aircraft are of nationwide concern. Congress recognized this inherent feature of aviation in the Federal Aviation Act when it called for a well planned, federal system of aircraft certification and safety regulation. As this

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[3] The court's motivation is unmistakable: "An inquiry in a state court into ... the requirements of the safety regulations, would assist the FAA in policing a manufacturer's compliance...." 37 Cal. 3d at 551. "A state court investigation ... promotes the safety of the traveling public." *Id.*

[4] As discussed *infra* in part I.D., this result is unaffected by the Court's recent holding in *Silkwood v. Kerr-McGee Corp.*, ____ U.S. ____, 104 S.Ct. 615 (1984).

Court's holdings have consistently recognized, planes are manufactured and operated by "federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands." *Lockheed Air Terminal,* 411 U.S. at 634; *Northwest Airlines,* 322 U.S. at 303. Moreover, the same federal interest dominates the regulation of aircraft design and manufacture:

> The interest of the federal government in regulating the design and manufacture of aircraft is just as intensive, pervasive, exclusive and great as its interest in regulating the "affairs of the nation's airways." ... The preemption by the federal government of the entire field of aviation is illustrated in ... *Lockheed Air Terminal* ... and *Northwest Airlines* ....

In re Paris Air Crash of March 3, 1974, 399 F. Supp. 732, 747 (C.D. Cal. 1975). *Accord, Kohr v. Allegheny Airlines, Inc.,* 504 F.2d 400, 403-04 (7th Cir. 1974), *cert. denied,* 421 U.S. 978 (1975).

The exclusive federal control of aircraft certification also extends to post-accident design changes. In the event of an accident, the federal scheme provides for the issuance of safety recommendations to the FAA by the National Transportation Safety Board. 49 U.S.C. § 1441(a)(3). The FAA may either accept or reject these recommendations based on its own review of the relevant safety considerations. 49 U.S.C. § 1906. This two-tier federal scheme is no mere formality. In the legislative history to the Independent Safety Board Act of 1981 Congress recognized "that it is not likely that every safety suggestion made by the Board will be accepted...." H.R. Rep. 97-108, 97th Cong., 1st Sess., *reprinted in* 1981 U.S. Code Cong. & Ad. News 1729, 1731. Policy judgments concerning certification and safety regulation are dominated by the same federal interest whether they arise in the manufacturing process or in the event of an aviation accident.

C. The Objects Sought by the Federal Law Preclude State Action

It is apparent that one of the primary objects sought by Congress in the Federal Aviation Act was a uniform, well planned, federal system of aircraft certification and safety regulation. House Report at 3746-47; *see* discussion in Part I.A, *supra*. To achieve this objective, Congress vested plenary authority for aircraft certification and safety regulation in the FAA. House Report at 3741-42. Congress, in addition, limited review of FAA decisions to a well defined administrative process. *See* 49 U.S.C. §§ 1481 *et seq*. The regulatory scheme which Congress put in place clearly manifests its intent to accomplish these goals through preemptive regulation. The decision below ignores and clearly subverts that intent.

D. Reconsideration of FAA Certification in Trial Courts is Preempted Because it Produces Results Inconsistent with Federal Objectives

One of the most disturbing aspects of the decision below is the conflict it creates between the certification standards established by the FAA and what amounts to a state standard for aircraft certification.

The question of aircraft certification was intended to be the exclusive province of the FAA. The California Supreme Court, nonetheless, endorsed a process whereby every trial court may review, reverse and contradict the FAA. The relitigation of aircraft certification and safety regulation by the state courts or federal courts sitting in diversity actually threatens to undermine safety—one of the primary objects of the entire certification process. There is good reason to conclude that safety would be best enhanced by uniformity. Standardization of aircraft designs promotes quality control and ease of maintenance and operation. Congress recognized these benefits when it decided to vest plenary authority over certification in the FAA. House Report at 3746-47. Congress also recognized the impor-

tance of uniform, coordinated post-accident regulation of aircraft design changes by providing for the review of the NTSB's recommended design changes by the FAA prior to implementation. *See* 49 U.S.C. § 1906.

The California Supreme Court's decision promises to replace this uniform, federal scheme mandated by Congress with a patchwork of conflicting state standards. "[U]nless all courts reached an identical conclusion a uniform standard . . . would be impossible." *Abilene,* 204 U.S. at 440. If the decision stands, judges and juries will be free to interpret the Federal Aviation Act and the Federal Aviation Regulations for themselves and decide whether aircraft certified by the FAA should have been certified. The best proof of this danger is respondent's own closing argument at the trial of this case:

> [T]his airplane is uncertifiable. It was uncertifiable then and it is uncertifiable now.
>
> This airplane could not have legally been built then; it couldn't legally have been built now. . . .
>
> But what about the FAA? What about the CAA, the people charged by the Congress of the United States to protect us from manufacturing errors and mistakes and from bad airplanes? What about the CAA? They approved this thing.
>
> Well, that may have sounded good before we started, but I hope it doesn't sound good any more, because the people in whom the people of the United States through the Congress of the United States have placed their trust don't do their job. . . .

See Appellant's Opening Brief in the Court of Appeal of the State of California at 13, 19, 2nd Civil No. 63299 (June 18, 1982). With the blessing of the trial court, these arguments were made in the face of FAA certification of the aircraft. The jury plainly was invited to reconsider for itself whether the FAA could legally certify the plane, notwithstanding Congress' un-

mistakable intent that decisions on the certification of aircraft are to be an exclusive, discretionary function of the FAA.[5]

In *Varig Airlines,* the Court expressed concern about judicial second-guessing of FAA decisions in tort actions:

> [W]hatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government in its role as a regulator of the conduct of private individuals....Congress wished to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort.

104 S. Ct. at 2765. The case at bar involves the same type of "second-guessing" and is squarely at odds with the regulatory scheme enacted by Congress, implemented by the FAA and interpreted by this Court in *Varig.*

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[5] The ramifications of this decision would extend to all industries in which products are certified by federal agencies in the interest of safety. This would include, *inter alia,* certification of pesticides and agricultural products by the Department of Agriculture under 7 U.S.C. §§ 136a, 136b, 243, 1380a and 2259; certification testing for compliance of consumer products with safety standards prescribed by the Consumer Product Safety Commission under 15 U.S.C. § 2063(b); certification of drugs and food additives by the Food and Drug Administration under 21 U.S.C. §§ 356, 357, 360b and 376; certification and licensing of offshore mining facilities by the National Oceanic and Atmospheric Administration under 30 U.S.C. § 1413; certification of marine sanitation devices by the Environmental Protection Agency under 33 U.S.C. § 1322; certification of electronic products for radiation emissions by the Department of Health and Human Services under 42 U.S.C. § 263f; certification of nursing facilities by the Department of Health and Human Services under 42 U.S.C. § 1396a; and certification of compliance of motor vehicles with emission standards by the Department of Health and Human Services under 42 U.S.C. § 1857f-5. Under the reasoning of the California Supreme Court, trial courts in cases involving any of these products could second-guess the federal agencies' judgment and hold that the product in question was unlawfully certified.

It is impossible to imagine how individual manufacturers will contend with the conflicts created by this decision. If a court finds that one model of an aircraft fails to meet its own interpretation of some FAA regulation, a manufacturer will be confronted with a dilemma. Must it ask the FAA to recertify the aircraft? What is it to do with regard to similar model aircraft, of which there may be hundreds or thousands? What will the implications be if some manufacturers take such action and others do not? Economic and competitive factors in the industry would further complicate the manufacturers' efforts to formulate a response. Moreover, if a manufacturer requests recertification, it is entirely unclear how the FAA should respond to such a request.

The decision poses an equally serious dilemma for commercial and private aircraft operators. If a court in a civil damage action decides an aircraft was improperly certified, serious legal uncertainty attaches to all operators of that aircraft who continue to operate it. Could a state court subsequently find the operator liable under common law theories of negligence for operating an improperly certified aircraft? Potential liability should another accident occur could be staggering. On the other hand, should an entire fleet be grounded on the basis of *ad hoc* decisions by lay judges and jurors? The economic implications of such decisions for the troubled airline industry would be enormous. These are the types of potential problems that mandate a uniform federal policy of aircraft certification and safety regulation, and this policy will be frustrated if the decision below stands.

Preemption is not avoided simply because plaintiffs seek monetary compensation for damages sustained in an aviation accident. This Court has recently stated that it will not permit the states "to use the threat of damages to require...exactly what [an agency] is empowered to excuse." *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981). In the case at bar, as in *Kalo Brick*, the findings by the agency, "made pursuant to the authority delegated by

Congress, simply leave no room for further litigation over the matters respondent seeks to raise in state court." 450 U.S. at 327. As the Court indicated in *Kalo Brick,* federal law preempts "common-law causes of action for damages stemming from... negligence and tort ...hen the judgments...necessary to the decision have already been made" by the federal agency. 450 U.S. at 327. The critical aspect of the case at bar is not that respondents seek to recover on a negligence theory or a theory of strict liability, but that they invoke a theory that directly attacks the FAA's decision to certify the aircraft.

In this respect, the decision of the California Supreme Court represents a misconstruction of the Court's recent decision in *Silkwood v. Kerr-McGee Corp.,* ____ U.S. ____, 104 S.Ct. 615 (1984). In *Silkwood,* this Court ruled that state court claims for punitive damages based on tortious conduct of companies regulated by the Nuclear Regulatory Commission were not preempted by the federal regulatory scheme. 104 S.Ct. at 626. However, the Court acknowledged in *Silkwood* that state law theories of tort recovery would be preempted if they come into "irreconcilable conflict" with the federal standard or "would frustrate the objectives of the federal law." 104 S. Ct. at 626.

Although the California Supreme Court acknowledged these limitations on the scope of *Silkwood,* the court's decision completely disregards and undermines them. This case presents an irreconcilable conflict between the FAA and the State of California. A claim based upon a theory of negligence *per se,* unlike the claim for punitive damages in *Silkwood,* required the state court to set aside the FAA's decision on certification of the aircraft and substitute its own interpretation of the governing federal regulations. The interpretation adopted by the state court is in direct conflict with the FAA's interpretation and must, therefore, bow to federal preemption under the FAA regulatory scheme.

The California Supreme Court's decision is also at odds with the federal case of *Fisher v. Bell Helicopter Co.,* 403 F. Supp.

1165 (D.D.C. 1975). *Fisher*, like the instant case, presented, *inter alia*, a claim of negligence *per se* based on violations of airworthiness standards established by the FAA. In *Fisher*, the FAA decided to continue certification of a helicopter for a grace period of fifty hours, although it had determined that certain bolts on the helicopter needed to be replaced in the interest of safety. The District Court for the District of Columbia held that the FAA's decision to continue certification precluded a finding of negligence *per se* based on the failure of the bolts to meet FAA airworthiness standards. 403 F. Supp. at 1174.

II. The Court Below Erred In Interpreting Federal Law

The decision below also threatens to undermine FAA policy by distorting the FAA's regulations governing certification. The court below misinterpreted those regulations by assuming that they establish mandatory design criteria for the manufacturer.[6] In fact, they establish only discretionary guidelines for the FAA.

Under the Federal Aviation Act, the FAA certifies aircraft based on a discretionary judgment of the aircraft's safety. 49 U.S.C. § 1423(2). Pursuant to the Act, the FAA has adopted a large number of "airworthiness standards" that the FAA itself may apply in determining whether to certify a particular aircraft,[7] but the FAA retains authority to grant or deny certification on the basis of safety standards different from or in addition to these. The applicable regulations provide expressly that the airworthiness standards published in FAR Parts 23-29 are

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[6] By statute, the California doctrine of negligence *per se* applies only if a person, *inter alia*, "violate[s] a statute, ordinance, or regulation of a public entity." Cal. Evid. Code § 669(a) (West Supp. 1985).

[7] The current guidelines for various types of airplanes appear in the Federal Aviation Regulations ("FAR"), Parts 23-29, 14 C.F.R. §§ 23-29, formerly the Civil Aeronautics Regulations ("CAR"), Parts 3, 4b, 6 and 7.

only one alternative means of qualifying an aircraft for certification. The FAA will also certify the aircraft if "any airworthiness provisions not complied with are compensated for by factors that provide an equivalent level of safety." 14 C.F.R. § 21.21(b)(1). Conversely, the regulations provide that the Administrator may impose "special conditions" above and beyond what is contained in the airworthiness standards. 14 C.F.R. § 21.21(b).

While manufacturers design to these standards, they serve merely as guidelines to the FAA and do not impose any legal duties on the manufacturer. It is the FAA, not the manufacturer, that decides whether an aircraft should be certified. A failure of an aircraft design to meet these standards, although it may result in a denial of certification, does not involve the violation of any legal duty imposed on the manufacturer.

Consistent with their status as guidelines, the FAA's airworthiness standards are not the subject of any of the prohibitions established in the Act. The Act's prohibitions relate solely to the violation of the terms of FAA production certificates or the operation of aircraft that have not been properly certified. 49 U.S.C. § 1430(a). Moreover, this Court recently acknowledged in the *Varig Airlines* case that the FAA's certification procedures are discretionary in nature and are protected by the "discretionary function" exception to the Federal Tort Claims Act.[9]

By permitting a finding of negligence *per se* based on airworthiness standards, the decision below conflicts with the reasoning of the sixth circuit in *Rimer v. Rockwell International*

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[9] Although the *Varig* case addressed specifically the FAA's decision to use a "spot-check" program to monitor compliance with its regulations, the case has subsequently been interpreted to be "wholly applicable" to more general claims of negligent inspection and certification by the FAA. *Natural Gas Pipeline Co. of America v. United States*, 742 F.2d 502, 504 (9th Cir. 1984).

Corp., 641 F.2d 450 (6th Cir. 1981). There the court held that provisions in the Federal Aviation Regulations that do not impose "specific duties" cannot serve as a basis for a finding of negligence *per se*. 641 F.2d at 454-55. Under this test, the airworthiness standards in this case could not have served as a basis for a finding of negligence *per se*, because they do not impose any "specific duties" on the manufacturer. The California Supreme Court ignored the discretionary nature of those standards and presumed some legal duty on the manufacturer to comply with them. The Court should grant the petition in order to correct this error of federal law which distorts the FAA certification scheme.

III. The Doctrine Of Primary Jurisdiction Requires Trial Courts To Defer To The FAA For A Decision On Allegations That An Aircraft Does Not Comply With FAA Regulations

Respondent's negligence *per se* theory in this case is predicated on allegations that the aircraft in question was improperly certified. However, respondent made no effort to bring these allegations before the FAA for agency decision prior to asserting them in court. For this reason, the procedure sanctioned by the California Supreme Court in this case violates the principle of primary jurisdiction, under which courts are required to defer to administrative agencies on matters which fall within their special expertise. *Weinberger v. Bentex Pharmaceuticals, Inc.*, 412 U.S. 645 (1973); *Pennsylvania Railroad v. United States*, 363 U.S. 202 (1960); *Far East Conference v. United States*, 342 U.S. 570 (1952). The decision below threatens to clog and complicate aviation accident cases with administrative certification questions that Congress intended to be directed to the FAA. It also undermines the uniformity and consistency that Congress hoped to achieve by vesting primary jurisdiction over air safety in the FAA. House Report at 3746-47.

The doctrine of primary jurisdiction applies with equal force to issues committed to agency decisionmaking, "even though the facts after they have been appraised by the specialized competence serve as a premise for legal consequences to be judicially defined." *Far Eastern Conference v. United States,* 342 U.S. 570, 574-75 (1952), quoted in *Bentex Pharmaceuticals,* 412 U.S. at 654. The Court reaffirmed this principle in *United States v. Western Pacific Railroad,* 352 U.S. 59 (1956). There, the Court formulated the following general rule:

> "Primary jurisdiction"...applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

352 U.S. at 63-64. *See also General American Tank Car Corp. v. El Dorado Terminal Co.,* 308 U.S. 422, 433 (1940).

In the instant case, respondent has used alleged violations of FAA certification guidelines as a premise for a legal finding of negligence *per se.* The decision below authorizes tort plaintiffs in this and future cases to do an end run around federal procedures governing product certification. In this case, statutory procedures were readily available to respondents for a proper, administrative determination of the certification issue. The Federal Aviation Act provides that the FAA may at any time reconsider the certification of aircraft and revoke existing certificates in response to a complaint filed by "[a]ny person." 49 U.S.C. §§1429, 1482(a). The Court should grant the writ and hold that the proper procedure for resolving respondents' allegations about certification of this aircraft was to file a complaint with the FAA.

IV. The Federal Aviation Act Of 1958 Precludes Review Of FAA Aircraft Certification By Trial Courts

Even if the FAA had denied respondents' allegations and declined to find improper certification, it was nonetheless erroneous for the trial court to entertain respondents' challenge to the certification of the aircraft, because Congress has vested exclusive jurisdiction over the review of FAA certification decisions in the federal courts of appeals.

In connection with the delegation of authority to an administrative agency, Congress may specify a particular forum for the judicial review of agency action, and the courts must enforce that choice. *City of Tacoma v. Taxpayers,* 357 U.S. 320, 336 (1958). In the Federal Aviation Act, Congress chose to vest jurisdiction over challenges to an FAA "order" in the United States courts of appeals. 49 U.S.C. § 1486(a). This provision establishes that Congress did not intend trial courts to review the FAA's orders. Moreover, the federal courts have consistently respected the exclusive jurisdiction established in §1486(a). *New York v. Federal Aviation Administration,* 712 F.2d 806 (2d Cir. 1983); *Nevada Airlines v. Bond,* 622 F.2d 1017 (9th Cir. 1980); *Sima Products Corp. v. McLucas,* 612 F.2d 309 (7th Cir.), *cert. denied,* 446 U.S. 908 (1980); *City of Rochester v. Bond,* 603 F.2d 927 (D.C. Cir. 1979).

The certification of the aircraft in this case constituted an "order" within the meaning of § 1486(a).[9] The administrative record supporting certification decisions is extensive, including manufacturers' design and performance data and results of

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[9] Under the Administrative Procedure Act, "order" includes "the final disposition...in a matter other than rule making but including licensing." 5 U.S.C. §551(6). A "license" includes "an agency permit, certificate, approval...or other form of permission." *Id.* § 551(8). Accordingly, FAA certifications have been held to be "orders" reviewable in the courts of appeals under § 1486(a). *O'Donnell v. Bond,* 510 F. Supp. 925 (D.D.C. 1981).

numerous tests and analyses conducted by the FAA.[10] *See* 49 U.S.C. § 1423. This record has been held adequate to allow complete judicial review. *O'Donnell,* 510 F. Supp. at 930. The courts have indicated that statutorily ordered methods of review may be held inappropriate only in extreme instances. *Nader v. Volpe,* 466 F.2d 261, 266 (D.C. Cir. 1972). There is no basis here for making an exception to the rule that only the federal courts of appeals are authorized to review FAA certification decisions.

Respondents in this case have completely ignored the procedures provided in § 1486. Faced with the FAA's official determination that the aircraft complied with all applicable FAA regulations and was qualified for FAA certification, they sought what amounts to a *de novo* review of this FAA decision in a tort action in the state courts of California. Although respondents seek money damages in the case at bar, their claims and the court's findings are based on a theory of negligence *per se* that looks behind the FAA's certification of the aircraft and reviews whether that certification was proper, *i.e.,* whether the aircraft in question complied with all certification requirements at the time of certification. The decision of the California Supreme Court in this case conflicts with the consistent interpretation of § 1486 by the federal courts, and subverts the congressional scheme limiting review of FAA certification to the U. S. courts of appeals.

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[10] In *Varig,* the Court acknowledged one manufacturer's estimate that the certification process may require the production of some "300,000 engineering drawings and changes, 2,000 engineering reports, and 200 other reports." 104 S.Ct. at 2761 n.7.

CONCLUSION

For the reasons stated, this Court should grant the petition for writ of certiorari, reverse the opinion of the California Supreme Court and reinstate the opinion of the California Court of Appeal.

Respectfully submitted,

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April 15, 1985